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No. 144

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY
Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA
Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

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MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the jurisdictional statement of appellant be dismissed on the ground that the federal question sought to be reviewed was not timely or properly raised in the Circuit Court of Kanawha County, West Virginia, and on the further ground that the state court did not expressly pass on the federal question sought to be reviewed.

STATEMENT OF THE CASE

Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64. The Road Commissioner declared the performance of appellant under his contract to be in default, and caused the appellant to be removed from the project. The appellant alleges that the Road Commissioner acted arbitrarily and without right or authority, and from this basic difference in positions there arises a multitude of substantial controversies of fact.

The appellant instituted a declaratory judgment proceeding in the Circuit Court of Kanawha County, West Virginia, seeking declaratory judgment as to the rights of appellant under the construction contract entered into by him and the State Road Commission of West Virginia, asking: (1) That the rights of the parties be declared; and, sequentially, (2) That, after a declaration of rights, the Commissioner be compelled to perform

his statutory duty to audit appellant's claim for work performed by appellant.

On May 19, 1964, the Court entered its final judgment order sustaining appellees ' motion to dismiss the proceeding as a suit against the State. This is the judgment upon which review is sought.

ARGUMENT

I

Appellant's principal contention is that he has been deprived of his property without due process of law. He complains of the fact that he has not had his day in court, and has had no judicial determination of the merits of his case.

The Supreme Court of the United States lacks jurisdiction of appellant's case because appelant has not exhausted his remedies in the State of West Virginia. The existence of ample and efficient administrative remedies under State laws, and the failure of appellant to resort to them in the state court, prevents him from taking advantage of a federal question involved in the case, and securing a review by the federal Supreme Court. Mellon Co. v. McCafferty, 239 U. S. 134. Certiorari does not lie to determine whether State procedure deprives one of due process if petitioner has not invoked the proper state remedy to have such matter determined. Phyle v. Duffy, 334 U. S. 431.

Article III, Section 9, of the Constitution of West Virginia, states:

> "Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

In effect, appellant is complaining that, in addition to the Fourteenth Amendment to the United States Constitution, the above-cited provision has been violated as well, and that his property, services and livelihood has been "taken" by the actions of the State Road Commissioner. If this be the case, appellant's proper, and still available, course was and is to institute proceedings in mandamus to compel Eminent Domain proceedings. State v. Graney, 143 W. Va. 643, 103 S. E. 2d 888; Riggs v. State Road Commissioner, 120 W. Va. 298, 197 S. E. 813; Hardy v. Simpson, 118 W. Va. 440, 190 S. E. 680; Childers v. State Road Commissioner, 124 W. Va. 233, 19 S. E. 2d 611. These cases uphold the proposition that such mandamus action will lie.

This is not to be confused with the mandamus procedure upheld by the West Virginia Supreme Court of Appeals in Draper v. Anderson, 102 W. Va. 633, 135 S. E. 837. In Draper, there was no great controversy over facts. The labor had been performed under a contract and the Road Commissioner has a "plain legal duty" to issue a warrant to the Auditor. In the present case, there is a controversy as to whether appellant did perform his part of the contract.

The Circuit Court of Kanawha County, in considering this declaratory judgment proceeding, held that the rights of appellant in this proceeding could rise no higher than the rights the appellant would have in an application for a writ of mandamus under the holding in the case of Draper v. Anderson, Supra, because the nature of the relief sought was the payment of money out of the treasury of the State for claims uncontrovertedly shown to involve substantial controversies of fact by the affidavits filed with appellees' motion to dismiss the complaint for lack of jurisdiction.

While the issue of eminent domain proceedings in connection with personal property is not as well established as is that issue as concerns real estate, it is not unknown. A court of claims case has held that a contractual right is within the protection of the Fifth Amendment prohibiting the taking of private property for public use without just compensation. Johnson v. United States, 79 F. Supp. 208. A Texas decision has held that a "going business" is "property" for which recovery can be had in eminent domain

proceedings. Priolo v. City of Dallas, 234 S. W. 2d 1014.

Article III, Section 9, supra, of the West Virginia Constitution, contains no qualification that the "property" can be only real property, nor does the Fourteenth Amendment to the Constitution of the United States, relied upon by appellant. In addition, eminent domain proceedings instituted by the Road Commissioner would ensure a full judicial hearing, with a jury, as desired by appellant. He would have his day in court to air the issues.

II

Appellant has also failed to make use of the procedures for making claims against the State in accordance with Chapter 14, Article 2, of the Code. As stated in Section 1 of the above-cited Chapter and Article:

> "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the

Court of Claims, "* * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * * cannot be heard in a court of law * * *." Code 14-2-3. (Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

"The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:

"1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

"2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.

"3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

III

Appellant has been told by the Circuit Court of Kanawha County and by the Supreme Court of Appeals that he cannot maintain his action utilizing the remedy that he has selected, i.e.,

declaratory judgment proceedings, since such proceedings, and the relief sought therein, if fully granted, would result in the controlling of the discretion of an official of the State, in a situation where such official must exercise his discretion in order to carry out the duties of his office. See Douglass v. Koontz, 137 W. Va. 345, 71 S. E. 2d 319.

The declaratory judgment proceeding chosen by appellant is a suit against the State in violation of Article VI, Section 35, of the West Virginia Constitution, and therefore the Circuit Court of Kanawha County properly sustained appellees' motion to dismiss the complaint for lack of jurisdiction.

CONCLUSION

Appellant has the protection of Article III, Section 9, of the Constitution of West Virginia, and has the perfect right to seek a writ of mandamus to require the Road Commissioner to institute eminent domain proceedings to award just compensation for property allegedly taken by the Road Commissioner for public use. In the event that appellant is denied such a writ of mandamus, then appellant has the statutory right to prosecute a claim against the State of West Virginia under the provisions of Chapter 14 of the Code of West Virginia.

For the reasons herein cited and discussed, it is respectfully submitted that appellant has not exhausted his remedies under the Constitu-

tion and the laws of the State of West Virginia, therefor the federal question is not properly before the court and accordingly his application for appeal should be denied.

Respectfully submitted,

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Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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